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Interpretation involves the acquisition of knowledge. We are continually confronted with the results of purposive action. Sometimes these results are written texts, such as statutes or novels. Other times these results are events in the physical world, actions that we observe or the results of actions about which we are told. To make sense of these results of purposive action, that is, to make the results be more than just a jumble of sense impressions, the observer must find a way of organizing the material with which he or she is presented. These methods of organizing the results of purposive action, of giving meaning or sense to such action, are properly dubbed "interpretive," because the methods of organization are directly linked to the fact that another organizing intelligence was on the other side of the action.[1]

The ways in which we interpret, or read, if you will, are themselves often products of the particular types of purposive action with which we are confronted. When interpreting statutes passed by Congress, therefore, courts must locate an interpretive method that best makes sense of the fact that they are reading *statutes*, and not some other type of purposive action.

Whether a general theory of statutory interpretation is possible, and what that theory might be, is beyond the scope of this essay. Instead, I will offer three interconnected discussions. First, I will focus on one proposed theory of statutory interpretation that is of some importance these days because its chief judicial proponent is Justice Scalia. He advocates following the "plain meaning" rule, which holds that courts must give effect to the plain, or literal meaning of a stat-

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1 What if a text is not the result of purposive action? Is its reading "interpretation?" *See infra* text accompanying notes 19–28.

ute's words, and should not examine extratextual evidence to determine how to apply the statute.[2] I will argue that the rule masks knowledge-gathering work that is always done when interpreting. Second, I will examine Fred Schauer's writings on plain meaning. Schauer has given us an extraordinarily rich array of writings on rules and various related matters. As part of this array, he offers arguments for the conceptual validity of plain meaning, for its psychological status, and for its institutional use. I will argue that as a conceptual matter, plain meaning makes sense, but in an extremely limited way; as a psychological matter, plain meaning obscures more than it illuminates; and as an institutional matter (in the setting of statutory construction), plain meaning is the wrong way to go. Finally, I will explore a related issue to which Schauer devotes considerable attention—the overridability of rules—and will suggest that the external pressure on rules in general—like the pressure of knowledge on plain meaning—creates an unruliness that rules cannot withstand.

Let me begin with two cases in which Justice Scalia discussed the plain meaning of statutory language. The first case is *Pittston Coal Group v. Sebben*.[3] At issue was a complex statutory-regulatory scheme governing the payment of benefits to coal miners afflicted with black lung disease. In the early 1970s, in response to congressional directive, the Department of Health, Education, and Welfare promulgated fairly lenient new regulations to speed up the process of adjudicating black lung benefits claims. Later that decade, with the Department of Labor (Labor) now in charge of the benefits program, Congress enacted the Black Lung Benefits Reform Act, authorizing Labor to establish new medical test standards for claims filed in the future. The Act also addressed pending claims, and gave the following directive: "Criteria applied by the Secretary of Labor in the case of . . . any [pending] claim . . . shall not be more restrictive than the criteria applicable to a claim [subject to old HEW regulations]."[4] In other words, Congress told Labor to apply to pending claims "criteria" that were no more restrictive than the "criteria" applied by HEW.

For reasons I need not get into, the case turned on whether "criteria" meant only medical criteria, that is, the ways in which black lung disease is physically measured, or whether "criteria" meant medical criteria *and* evidentiary criteria, that is, the "system of presumptions

2 This is certainly Scalia's general approach. *But see infra* text accompanying notes 8–13.

3 488 U.S. 105 (1988).

4 *Id.* at 107.

through which the medical criteria were utilized."[5] If "criteria" meant only medical criteria, then Labor's regulations would be upheld and the employers would win; if "criteria" meant medical and evidentiary criteria, then Labor's regulations would have to be modified, and the miners would win.

Justice Scalia wrote the opinion for the Court, holding that "criteria" means both medical and evidentiary criteria. He was joined by Justices Brennan, Marshall, Blackmun, and Kennedy, a rather unusual lineup. His argument was straightforward.[6] "Criteria" is an unmodified term; on its face, it does not distinguish between types of criteria. If Congress had wanted to refer to "medical criteria" only, it could have done so by adding the word "medical." In fact, at another place in the same statutory section, Congress used the term "criteria for all appropriate medical tests," showing that it knew how to modify the term "criteria" when it wanted to. Thus, the unadorned "criteria" would be left unadorned, to apply to medical and evidentiary criteria alike.

Justice Stevens dissented, joined by Chief Justice Rehnquist and Justices White and O'Connor. He offered various types of evidence to demonstrate that participants in the legislative process—that is, people who testified at hearings, Congresspersons, and administrative agents—all used the term "criteria" interchangeably with the term "medical criteria."[7] Often these participants would use the term "medical criteria" at the beginning of a sentence and "criteria" at the end. Or they would flip-flop the two terms throughout a paragraph, or throughout an interchange with another participant. In other words, according to Justice Stevens' analysis of the materials outside the statutory text, the drafters of the Act never thought twice about modifying "criteria" with "medical," because "criteria" had become synonymous with "medical criteria."

Now let me turn to the second case, *Green v. Bock Laundry Machine Co.*[8] Here the law in question was Federal Rule of Evidence 609(a), which governs impeachment of a witness through introduction of prior felony convictions. In relevant part, the Rule states that such convictions shall be admissible to impeach a witness if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant."[9] In the civil trial below, the

5 *Id.* at 134 (Stevens, J., dissenting).

6 *See id.* at 115.

7 *See id.* at 131–46.

8 490 U.S. 504 (1989).

9 *Id.* at 509 (quoting FED. R. EVID. 609(a)(1)).

judge had admitted a prior felony conviction against the plaintiff without balancing probativeness against prejudice. The Court, in an opinion by Justice Stevens, noted that the plain meaning of Rule 609(a) would require balancing probativeness against prejudice before admitting a prior felony conviction against a civil defendant, but not against a civil plaintiff.[10] Justice Stevens examined the extensive legislative history of Rule 609(a) and concluded that the drafters meant to require a balance in the case of a *criminal* defendant, but to require the admission of prior felony convictions without conducting a balance in the case of both a civil plaintiff *and* a civil defendant.[11]

Justice Scalia concurred in the judgment. He stated that applying Rule 609(a) literally would produce an absurd result, that balancing for civil defendants but not civil plaintiffs makes no sense.[12] He thought it appropriate to consult legislative history only to determine whether the drafters in fact intended to create such an absurd distinction,[13] and found no such evidence. Ultimately, after assessing some possible alternatives regarding what the term "defendant" as used in Rule 609(a) might mean, he agreed with the majority's conclusion that it refers to a criminal defendant only.

How is it that Justice Scalia knew that applying the plain meaning of "defendant" was absurd? Let me start by examining the ways in which the plain meaning is *not* absurd. It is not absurd because of some internal inconsistency, that is, the plain meaning does not produce any contradiction within Rule 609(a) or within the Rules of Evidence. Additionally, it is not absurd in the way a typographical error is. Furthermore, it is not an example of a structural incoherence, such as omitting the word "not" from a criminal statute that clearly is meant to prohibit something. Finally, and most importantly, it is not absurd in the sense that there is no *conceivable* reason to have drawn a distinction between civil plaintiffs and civil defendants. Granted, the distinction at first blush appears quite odd, but there is at least a rational basis for it. Requiring a balance of probativeness against prejudice in the case of a civil defendant only would add an extra burden that a plaintiff must consider before filing suit, and thus would increase the incentives not to litigate. In other words, this is not a case in which one can't even think up a rational reason for the distinction.

Nonetheless, the plain meaning of Rule 609(a) appears quite odd, and even such a plain meaning adherent as Justice Scalia was

10 *See id.* at 509–10.

11 *See id.* at 511–24.

12 *See id.* at 527 (Scalia, J., dissenting).

13 *See id.*

willing to depart from it. His departure from plain meaning in *Bock Laundry* was based not on a type of absurdity that I've mentioned above, but rather on his underlying knowledge of the Rules of Evidence and of the ways in which civil litigation is conducted in this country. Distinguishing between civil plaintiffs and defendants for the purpose of admitting prior felony convictions matches no usual or known purpose or goal of the civil litigation system, or at least no purpose or goal that is usually thought to be advanced in this fashion. In other words, Justice Scalia brought to bear on his interpretation of the term "defendant" all the knowledge he had already accumulated as an American lawyer, and held the term absurd because he knew from that background knowledge that the Rule almost certainly cannot mean what it says.

But Justice Scalia was not willing to do the work to gain this background knowledge in *Pittston Coal.* Where Justice Stevens educated himself about the background of the black lung benefits laws to understand how the term "criteria" was used by those who were involved with black lung benefits legislation, regulation, and litigation, Justice Scalia contented himself with the knowledge that the term "criteria" doesn't have an adjective in front of it. But the only difference between *Pittston Coal* and *Bock Laundry* is that the knowledge in one case had to be obtained now, at the time of adjudication over the meaning of the term in question, whereas the knowledge in the other case had already been obtained. What particular font of knowledge any given judge has will almost certainly vary depending on the background of the judge in question, and it seems a mere happenstance that some terms will be "known" to be out of whack with the legal area in question without additional work while other terms will be "discovered" to be out of whack after further investigation. Justice Scalia's approach in *Pittston Coal* appears indefensible.

The *Pittston Coal-Bock Laundry* problem is symptomatic of a deeper problem regarding the possibility of "plain meaning." The claim is sometimes made that the plain meaning of terms can at least be understood to apply to certain core, or easy cases. Someone making this claim acknowledges that even for easy cases to exist, there must be some general background assumptions made: that the interpreter has a basic, or perhaps educated understanding of the English language, and that words have basic, widely accepted definitions. Thus, one might argue that the word "cat," however problematic it might be when applied to a lion (or to a person with feline qualities), at least applies clearly to standard furry whiskered household pets.

As my discussion of *Pittston Coal* and *Bock Laundry* indicates, I do not believe that there is a relevant distinction between easy and hard

cases, at least insofar as one is concerned with the relationship between the knowledge of the reader and the meaning the reader gives to the words in question. My claim is that context, or background, is necessary, but suppressed, in easy cases; in other words, noncontroversial cases already exclude contextual attributes that make other cases hard. So, for instance, what makes the application of the word "cat" to the household pet easy is that the pet lacks a mane, lacks a roar, lacks the quality of untamedness; in other words, the attributes of the pet exclude the problematic attributes of the lion that we are not sure are contained within the term "cat." Were the term in question "beast" instead of "cat," then the application to the pet becomes hard because it includes attributes such as domesticity that the lion, clearly a beast, lacks.

Just as Justice Scalia allowed knowledge-gathering work he had already done to dictate his interpretation in *Bock Laundry*, the interpretation of the easy case is based on background knowledge that the interpreter deems at least a minimal requirement for being an interpreter, or reader, in this society. But what I demonstrated in my discussion of *Bock Laundry* was that an understanding that appears *a priori* in fact had to be developed at some point. Thus, just as it appeared a mere happenstance to utilize that developed knowledge in *Bock Laundry* but not to develop such knowledge in *Pittston Coal*, it is similarly a mere happenstance to rely upon already excluded attributes in calling one case "easy," but to call another case "hard" because certain attributes have not been excluded. In sum, my point is that there is always work involved in understanding what words mean, and the fact that sometimes that work has already been done does not materially distinguish cases in which the work has yet to come. A judge has to work to know; interpretation is the life of this work.

Fred Schauer argues that language can constrain decisionmakers, as a conceptual matter,[14] and that it is "quite plausible" that language does in fact constrain decisionmakers.[15] Here is how he puts it in *Playing by the Rules*:

> The identification of acontextual meaning involves not the denial of the necessity of context, but the recognition that a large number of contextual understandings will be assumed by all speakers of a language. These aspects of context might be thought of as a *univer-*

14 Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 520–29 (1988) [hereinafter Schauer, *Formalism*].

15 *Id.* at 530.

> *sal context*, or *baseline context*, precisely because, however much these widely shared components of context may be temporally and culturally contingent, they are largely invariant across English speakers at a given time. Thus, the universal context is to be distinguished from the particular context, those specific aspects of the occasion on which language is used, including but not limited to a speaker's communicative goals in using that language. The distinction I want to draw, therefore, is one between the context that is understood by (and partly constitutes) the linguistic community at a given time, and the context that is the specific occasion of utterance.[16]

He adds, "[t]he meaning I refer to as 'acontextual' can also be called 'literal' or 'plain.'"[17] Here is part of his argument for the conceptual claim from *Formalism*:

> Fuller and his followers fail to distinguish the possibility and existence of meaning from the *best* or *fullest* meaning that might be gleaned from a given communicative context. In conversation, I am assisted in determining what a speaker intends for me to understand by a number of contextual cues, including inflection, pitch, modulation, and body language, as well as by the circumstances surrounding the conversation. That such contextual cues assist my understanding, however, does not imply that the words, sentences, and paragraphs used by the speaker have *no* meaning without those cues. The "no vehicles in the park" rule clearly points to the exclusion of the statue [of a truck erected as a war memorial] from the park even if we believe that the exclusion is unnecessary from the point of view of the statute's purpose.[18]
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> . . . .
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> . . . Words communicate meaning at least partially independently of the speaker's intention. When the shells wash up on the beach in the shape of C-A-T, I think of small house pets and not of frogs or Oldsmobiles precisely because those marks, themselves, convey meaning independently of what might have been meant by any speaker. Of course there can never be *totally* acontextual meaning. The community of speakers of the English language is itself a context. Yet meaning can be "acontextual" in the sense that that meaning draws on no other context besides those understandings shared among virtually all speakers of English.[19]

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16 FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 57 (1991) [hereinafter SCHAUER, PLAYING BY THE RULES].

17 *Id.* at 58.

18 Schauer *Formalism*, *supra* note 14, at 526.

19 *Id.* at 527–28.

What does it mean to say that words have meaning without contextual cues? As Schauer acknowledges, words must be understood in some context, and the context to which he refers is best explained in the last sentence quoted above—"no other context besides those understandings shared among virtually all speakers of English." Given this caveat, I agree that "plain meaning" is conceptually plausible. But when do we encounter words in such a barren context? Virtually never. In almost every setting in which we must understand words, more context is present, and the question then becomes what to do about that context.

Schauer's own example of shells on the beach helps demonstrate the limited sense in which the concept of plain meaning can suffice as a tool of interpretation. Assume that I do not come upon shells in the shape of C-A-T (for then I might wonder whether a person put them into that shape). Assume, rather, that as I am sitting on the beach, shells wash up near me into the shape of C-A-T. (A wondrous thing, indeed.) Here we might sensibly speak of "plain meaning," for by stipulation there is no purpose behind the appearance of the word. (This of course ignores the possibility of a theistic cause of the shells' appearance.) So if I asked a random sample of speakers of English what the shell shape means, people would most often refer to the standard household pet known as a "cat." Plain meaning, thus, can now be understood as the most likely connotation a speaker of the language would make of a particular word, assuming by stipulation the absence of any purposive actor behind the speaking or writing of the word.

But words do not usually wash up on the shore. It is as natural to understand words in the purposive context in which they're spoken as it is to attribute a plain meaning to them. Schauer acknowledges this in an interesting way when he states that "linguistic conventions may exist within a technical or professional subcommunity of a larger community."[20] But why should we limit the departure from plain meaning (understood as the most likely connotation given the absence of a purposive speaker) to technical or professional subcommunities? In every situation in which the interpreter is aware of the purposive nature of the utterance, a subcommunity of sorts exists. If I hear the sentence "Have you seen my cat?" and I am in the presence of a friend whose standard household pet is missing, I will understand "cat" in its least common denominator, plain meaning fashion. But if I hear it

20 *Id.* at 529 n.59; *see also id.* at 538 n.85 ("Where some aspect of the minimal and uncontested context makes it plain that a settled specialized or technical meaning of a term or phrase applies, that technical meaning, rather than the ordinary usage of the man on the Clapham omnibus, is controlling.").

spoken by a three-year-old child who always walks around with a toy cat, I will immediately understand "cat" as referring to the toy, and not to a live household pet. And if my friend has a daughter named Katherine who is called Kat, I will understand "Have you seen my cat?" as referring to the whereabouts of his daughter. And so on.

Attributing purpose to speech and writing is just as natural, and just as conventional, as understanding words to refer to their most likely connotation. Easy cases, for Schauer, seem to be those instances in which there is no reason to depart from the most likely connotation.[21] This is fine so far as it goes, but how far is that? Another way of understanding easy cases—a way that will give us greater purchase on the pressure that emanates from the purposive quality of most speech and writing—is to understand them as instances in which properties or attributes are suppressed.[22] A case becomes hard when properties or attributes that go beyond the least common denominator connotation force their way into consciousness. As I have put it elsewhere, "Cases are easy . . . because of the presence of uncontested predicates . . . [and] hard cases are hard . . . because of the presence of contested predicates."[23] The psychological constraint of plain meaning that operates on an unself-conscious level does so only if properties or attributes are suppressed that would make one aware of the possibility of an understanding that departs from the most likely connotation.

In every case except for the shells on the shore, work needs to be done to understand what a word means.[24] Let's consider some of Schauer's examples of supposedly easy cases. My claim is that to the extent the case is easy, it is so because of the suppression of attributes that could make the case hard. We can almost always (shells on the shore excepted) stipulate further conditions that would render the least common denominator understanding ("plain meaning") in doubt. Schauer writes, "The 'no vehicles in the park' rule clearly points to the exclusion of the statue from the park even if we believe that the exclusion is unnecessary from the point of view of the stat-

21 Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 425 (1985).

22 In discussing rules as generalizations, Schauer writes: "In focusing on a limited number of properties, a generalization simultaneously *suppresses* others, including those marking real differences among the particulars treated as similar by the selected properties." SCHAUER, PLAYING BY THE RULES, *supra* note 16, at 21–22.

23 Abner S. Greene, *Discounting Accountability*, 65 FORDHAM L. REV. x, x (forthcoming 1997).

24 Sometimes the work has already been done. *See supra* text accompanying notes 8–13.

ute's purpose."[25] This conclusion is actually not so clear. We need to know more about "vehicle" to know whether a statue is one. Schauer acknowledges this problem later in the same piece when he writes that "locomotive capacity may now be definitional of a 'vehicle.'"[26] He adds that the defect is only in the example. He continues: "I will therefore stipulate, for the purposes of this argument, that a statue of a vehicle *is* a vehicle, just as a lion in a cage is still a lion. Consider a rule prohibiting 'live animals on the bus' and whether it would prohibit carrying on the bus three live goldfish in a sealed plastic bag."[27] The stipulation that a statue of a vehicle is a vehicle, however, does nothing more than the stipulation that the C-A-T shells were formed randomly by the waves. One can always stipulate away any attribute, any element of context, that might throw into doubt the most likely connotation of a term. But this just allows us to say that terms do have most likely connotations, whatever other connotations they might have given the various settings in which they occur.

The "goldfish are live animals" example is somewhat different. At various points when the apparently plain meaning of a term isn't so plain, Schauer turns to a natural kind example. Goldfish are animals is one. Another is when he maintains that "pelicans are birds" is an easy case but "liberty includes labor contracts" is a hard one.[28] One thing to say here is that "animals includes goldfish" and "birds includes pelicans" are examples of natural kinds, in which by stipulation "*X* includes *Y*." As Schauer explains in a discussion of the word "water," "According to the standard version of the theory, certain words are transparent to the actual kind (or artefact) itself, as currently understood by the best available theory of just what water *is*."[29] Schauer acknowledges this in the context of arguing that we can separate what water is under "the currently understood best theory" from "what some decision-maker would want to do with this water at this time."[30] But here I believe the admission is more damaging to the usefulness of plain meaning. If a word is transparent to the actual kind, then when we say "*X* includes *Y*" we are simply restating a definitional point. Restating a definition is different from interpreting a word as spoken or written. Thus, a rule stating "no live animals on the bus" is the equivalent of a rule stating "no live alligators, birds, cats, dogs, eagles, flounder, goldfish . . . etc. on the bus." All of the cases

25 Schauer, *Formalism*, *supra* note 14, at 526.
26 *Id.* at 533 n.70.
27 *Id.*
28 *See id.* at 512.
29 SCHAUER, PLAYING BY THE RULES, *supra* note 16, at 216.
30 *Id.*

that are interesting, however—that is, all of the cases in which one might debate the usefulness of plain meaning as a way of reading—are not these cases, but rather cases such as: May I bring a toy dog into a restaurant with a "No dogs allowed" sign? And I don't mean "Will the purpose of the rule be transgressed by bringing my toy dog?" (I agree with Schauer that that sort of question is of a different order.) I mean "Is a toy dog a dog?"

So let's assume now we're talking not about shells on the shore, and not about stipulated definitions of what natural kinds include, but rather about words used by human beings in certain contexts. My arguments above suggest that it is as natural for people to understand a word contextually as it is for them to understand a word according to its most likely connotation, because just as people share a least common denominator understanding of language, so do they understand words in context, and appreciate (self-consciously or not) that work must be done to find the right connotation. One might accept this, yet make a different type of claim on behalf of plain meaning, namely, that in certain settings, particularly certain legal, institutional settings, it is better to stick with the least common denominator, "plain meaning". In defending the use of rules more generally (not "plain meaning" in particular), Schauer indeed offers reasons that could apply to a defense of plain meaning in legal interpretation. In another work, he offers an argument specifically about plain meaning in statutory interpretation. I will summarize the more general defense of rules and then describe in greater detail the more specific argument about plain meaning in statutory interpretation and explain why I think it mistaken.

In *Playing by the Rules*, Schauer sets forth a set of arguments for rule-based decision-making. The arguments include "fairness" (deemed problematic because rules fail to recognize relevant similarities and differences[31]), "reliance" (also problematic because its value varies depending on things like the frequency of otherwise suboptimal results and their consequences[32]), and "stability for stability's sake" (ultimately somewhat empty, because we can't know whether stability is a goal "worth serving without having a substantive conception of where we are, and where we want to be"[33]). The three arguments for rules that are most relevant for defending a plain meaning rule are efficiency,[34] comparative error costs,[35] and allocation of power.[36]

31 *See id.* at 135–37.

32 *See id.* at 137–45.

33 *Id.* at 158.

34 *See id.* at 145–49.

Schauer explains that rules may promote efficiency by "free[ing] decision-makers to do other things."[37] Similarly, a plain meaning approach may be seen as allowing a judicial short-cut to a solution. He suggests further that we must keep in mind two types of error—just as we might err from applying a rule when a more contextualized assessment would have reached the optimal result, so might we err by engaging in such a contextualized assessment. Similarly, a plain meaning rule reminds us that allowing a more broad-ranging judicial search may lead to its own sort of errors. Finally, Schauer maintains that rules help allocate power by privileging past decisions over present ones and by divvying up decision-making in a jurisdictional fashion. Similarly, a plain meaning rule might be seen as locating authority in the text and away from future human readers.

In *Statutory Construction and the Coordinating Function of Plain Meaning*,[38] Schauer argues that Supreme Court Justices should self-consciously constrain themselves to statutory plain meaning, for reasons similar to those suggested by the more general argument from *Playing by the Rules*. The "real question" is "whether in some contexts the reliance on text or plain meaning, for all its imperfections and consequent suboptimal results in individual cases, might still be preferable to the use of theoretically richer and more sensitive tools by multiple and decidedly suboptimal decisionmakers."[39] "Plain meaning . . . is a blunt, frequently crude, and certainly narrowing device, cutting off access to many features of some particular conversational or communicative or interpretive context that would otherwise be available to the interpreter or conversational participant."[40] On the Court, plain meaning in statutory construction is helpful especially when cases are not interesting and when neither the Justices nor their clerks have "much context-sensitive expertise."[41] Given these two predicates, "how are the Justices to achieve some degree of agreement?"[42] The answer to this coordination problem, says Schauer, is to rely on the least common denominator ground of plain meaning.

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35 *See id.* at 149–55.

36 *See id.* at 158–62. For an argument that the best defense of the free speech principle is also based in concerns about limiting governmental power, see FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 73–86 (1982).

37 *See* SCHAUER, PLAYING BY THE RULES, *supra* note 16, at 146.

38 Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231.

39 *Id.* at 252 n.83.

40 *Id.* at 252.

41 *Id.* at 253.

42 *Id.* at 254.

My discussion of *Pittston Coal* [43] and *Bock Laundry*[44] leads to the opposite answer to the coordination problem. Putting aside a threshold question—why is finding agreement the appropriate role for a Supreme Court Justice?—if the goal is for judges to be on a level playing field regarding a matter of statutory construction, requiring all judges to educate themselves about the area in question is a better solution than asking all to reduce their judgment to plain meaning. First, there is a natural human bias toward departure from plain meaning when one knows something about the field in question. It's hard to suppress information one has. If I am a judge from West Virginia and have worked with coal miners and their bosses and know that "criteria" means "medical criteria," it is going to be hard for me to write something different in an opinion. Second, there is a great disparity among what judges know. One judge may be an expert in the field, another have a little knowledge, and another none. Why ask the first two judges to reduce themselves to the knowledge level of the third? Why not ask the second two judges to increase their learning? Third, to those in the affected area—management, labor, industry, consumers, or what have you—there is an appearance of irrationality if judges rely on plain meaning when some education would have allowed them to understand the statutory terms more fully. Finally, the debate here is similar to the debate between Judges Leventhal and Bazelon on the D.C. Circuit in the 1970s.[45] Leventhal advocated greater judicial research into the substance of agency action, while Bazelon, deeming it too hard for judges to get their hands dirty in this way, pushed for greater judicial administration of agency procedure. Leventhal won the debate handily through the Supreme Court's endorsement of judicial "hard look review" in *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*[46] and its rejection of judicial tinkering with agency procedure in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*[47]

My central point in attacking the plain meaning approach to statutory interpretation has been that it cannot be what it claims to be. It appears to close off inquiry, but it cannot do so; the pull of the external is always present, even when suppressed. Meaning appears plain because attributes that would render such appearance problematic

43 *See supra* text accompanying notes 3–7.

44 *See supra* text accompanying notes 8–13.

45 *See, e.g.*, Ethyl Corp. v. EPA, 541 F.2d 1, 66, 68 (D.C. Cir. 1976) (opinions of Bazelon, J., and Leventhal, J., concurring in the result).

46 463 U.S. 29 (1983).

47 435 U.S. 519 (1978).

are suppressed (either consciously or not, often not). Meaning appears contestable when attributes have bubbled to the surface. What one knows now, is based on the work of one's life. It is arbitrary to rely on work already done—to say, "I will read this text based on how it appears, without delving into context"—and not to do more work now.

This problem—a rule-like mien, the intrusion of exogenous considerations—is at the heart of another matter to which Schauer devotes significant attention in *Playing by the Rules*: the overridability of rules. As Schauer puts it, for something to be a rule, it must (among other things) not be always open to challenge from an all-things-considered judgment. It must, at least sometimes, be impervious to such a challenge. But unlike those who claim that rules must be totally impervious, Schauer argues that rules can be overridden—often—so long as they maintain some stickiness, some resistance to the ad hoc. He says this many times, in many ways, in the book.[48]

In his key section on the overridability of rules, Schauer takes on Joseph Raz, a proponent of the view that rules are incapable of override.[49] Schauer reports Raz's example of a woman who "adopts as a rule for herself that she will always spend her holidays in France, thereby excluding the possibility of acting on the reason that hotels in some other part of the world are offering particularly good deals this year."[50] Suppose she learns of a great deal in the Austrian Alps, "dramatically"[51] more inexpensive than the planned French vacation. Under Schauer's view, the woman "could see this as such an obviously good deal that the exclusion of considering such factors could be overridden,"[52] even though she would not permit other good (but not great) deals to trump her France-only rule. Here I am not interested in the Schauer-Raz debate: I agree with Schauer that this example, and others like it, do not demonstrate that the woman has rejected the rule or that the override is really outside the scope of the factors

48 *See* SCHAUER, PLAYING BY THE RULES, *supra* note 16, at 45 n.8, 52 n.18, 84 n.13, 88–93, 110, 117, 203–05, 230; *see also* Frederick Schauer, *The Jurisprudence of Reasons*, 85 MICH. L. REV. 847, 859, 861 (1987); Schauer, *Formalism*, *supra* note 15, at 545–46; Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 897 (1991); Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 674–79 (1991).

49 *See* PLAYING BY THE RULES, *supra* note 16, at 89. More precisely, according to Schauer, Raz takes exclusionary reasons as incapable of override, claiming that an exclusionary reason 'always prevails' in cases of conflict with a first-order reason. *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

excluded, but rather that it makes sense to think of rules as overridable.[53] My concern is from the other side: I wonder whether Schauer has perhaps proved too much, whether his persistent acknowledgment of the overridability of rules has cast into serious doubt the work that he claims for rules.

Let's examine the French vacation example. Schauer refers to the Austrian Alps possibility as an "obviously good deal" and as an "especially dramatic case."[54] The France-only rule would be overridden in such situations only; the woman would Aconsider certain excluded factors when and only when they are particularly compelling."[55] Schauer continues,

> it might then seem to Raz that if the agent must look at the [excluded] first-order reason, and must determine if it is to control in this case, then it has not been excluded at all. My account, however, does not see this as a psychologically impossible situation, supposing instead that there may be a difference between a careful look at a first-order reason and merely a perfunctory glimpse at it.[56]

How, though, does one determine that an excluded reason is "obviously good," "especially dramatic," or "particularly compelling," rather than just good, dramatic, or compelling? One needs a theory that is not dictated by the rule itself, and whatever factors that theory makes relevant will always be in play, even when they are suppressed. So, when the woman easily takes her French vacation because no really great deals have come up, she might not be consciously thinking about other vacation ideas, but that is because of the absence of the complicating possibilities. This is similar to the plain meaning situation—we sometimes rely on plain meaning quickly and easily, but can be yanked away from that ease by hitherto suppressed attributes brought to our attention in one way (perhaps we have some background knowledge?) or another (perhaps we've just learned something new?). The calculus of whether to override a rule is *always* operating, whether in the foreground (in what we might call "hard cases") or in the background (in what we might call "easy cases"). Once one acknowledges that there are other factors to consider, just like once one considers, in the statutory interpretation setting, that there is other knowledge about the relevant field beyond plain meaning, then those other factors, that other knowledge, is constantly in play, whether foregrounded or backgrounded. It is now difficult to

53 *Id.* at 90.
54 *Id.*
55 *Id.*
56 *Id.* at 91.

understand why the rule—or the plain meaning—should be considered foreground and the other factors—or the other knowledge—should be considered background. Why not the other way around? The positivist virtues of rules (even if the positivism is merely presumptive, as Schauer argues[57]) diminish significantly when one considers the necessary intrusion of exogenous factors, the ineluctable pull of external considerations, as not merely something that can be dismissed with a "perfunctory glimpse" (although it may sometimes seem that way to rule-appliers), but rather as an unruly interplay of rule and override. We always need a theory to understand when to override, and that theory cannot be dictated by the rule itself.

Additionally, one of Schauer's arguments for rules—that they allow one to defer to the authority of others—states too narrow a view of responsibility. He writes, "Defending one's errors by reference to rules is often a successful strategy, in part because when one makes an error by following a rule, at least part of the responsibility can be attributed to (or blamed on) the rule-maker, whereas the rule-breaker has no such easily available blame-sharing option."[58] And later: "[T]he rule-follower can be characterized as simply deferring to the decision-making capacities of another. An agent who says, 'This is not my job', is not necessarily abdicating responsibility. One form of taking responsibility consists in taking the responsibility for leaving certain responsibilities to others."[59] The problem with these formulations, however, is that given the always-lurking possibility of override, one must always decide whether this is the time to follow a rule, and that decision depends on factors that the rule itself cannot control. Responsibility must remain in the hands of today's decisionmaker; the decision to follow a rule may sometimes seem easy, but that is only because of a complicated backgrounded set of ruling-out decisions that one has already made.

Fred Schauer's work has moved easily from freedom of speech to legal theory, and his voice speaks with great clarity and insight. My disagreements with him about plain meaning, and my questions about whether the overridability of rules renders rules more unruly than Schauer would like, are based in arguments about the work of knowledge. That is something that Schauer, in his remarkable legal career, has shown us, through his example, time and again.

57 *See id.* at 196–206.

58 *Id.* at 153.

59 *Id.* at 162.